or Section 253(a) of the TCA.

None of these authorizing sources permit the occupation and/or utilization of PROW to provide cable modem services, assuming it is not a cable service, without the further authorization of local government. First, it would seem obvious that the cable operator cannot rely upon its cable franchise as source authority given the Commissioner's determination cable modem service does not constitute a cable service. Second, Cal. Pub. Utilities Code § 7901 does not sanction the occupation and/or utilization of PROW for the provision of cable modem services. Given the Commission's determination that cable modem service is not a Telecommunications Service, it is not subject to CPUC authority. Although Cal. Pub. Utilities Code § 7901, originally adopted as Cal. Civil Code Section 536 in 1905, does not draw any distinction between the type of protected activities or services but rather draws the distinction between telephone lines and non-telephone lines, the California Telecommunications Infrastructure Development Act (the "California Infrastructure Act"), adopted by the California Legislature in 1996 subsequent to the adoption of the TCA, conditions protection upon a determination that the user "has obtained all required authorizations to provide ***Telecommunications Services*** from the Public Utilities Commission and the Federal Communications Commission." (Emphasis added; Cal. Gov't Code § 50030). A review of the legislative history of the California Infrastructure Act indicates that the California Legislature was aware of the existence of the TCA and the need to coordinate the federal and state legislative schemes. In addition, because the California Infrastructure Act was expressly characterized as a statement of existing law, it is reasonable to assume that Cal. Pub. Utilities Code § 7901 would draw the same distinction between a protected and non-protected activity.[16]

Like the Commission, the CPUC and the California courts have recognized that the jurisdiction of the CPUC is limited to "public utility" activities which involve a

[16] Such a distinction is sensible given the nexus between the scope of Cal. Pub. Utilities Code § 7901 and the jurisdiction of the CPUC. If a particular activity is not subject to the jurisdiction of the CPUC based upon its lack of common carrier identity, is not logical to infer legislative intent to grant preferred right-of-way status to that activity.

commitment to provide a service on a non-discriminatory basis.[17] The CPUC has found that individualized private negotiations between a provider, whether of telephone services or other type of traditional public utility service, can preclude a finding of dedication to public use for the purposes of establishing CPUC jurisdiction. *In the Matter of So Cal. Edison Co., supra*, at 22-23; *People v. Orange County Farmers & Merchants Assoc.*, 56 Cal. App. 205, 210-211 (1922). California's Supreme Court has recognized the essentiality of common carrier regulation as a prerequisite to CPUC jurisdiction. (*Television Transmission, Inc. v. Public Utilities Com.*, 47 Cal.2d 82, 88, 301 P.2d 862 (1956).)[18]

Third, Section 253(a) of the TCA does not affirmatively authorize the occupation and/or utilization of PROW for the provision of cable modem service even if it constitutes a Telecommunications Service in the Ninth Circuit. First, Section 253(a) does not constitute a federal affirmative grant for the use of PROW but simply constitutes a limitation upon the authority of state and local government to prohibit certain types of protected services. (*City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir., 1999).) Even in the case of protected "Telecommunications Services," which may or may now not include cable modem service, PROW occupation is still subject to franchising and reasonable entry restrictions. (*TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir., 2000).) Thus a cable operator cannot look to Section 253(a) for initial access authority to utilize PROW for the provision of cable modem service.

D. Commission Preemption Of Local Franchising Is Unlawful.

In *City of Dallas, Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999) ("*Dallas*"), the Fifth

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[17] Whereas Federal law utilizes the "common carrier" vs. "non-common carrier" nomenclature, California law relies upon the notion of whether the entity has held out its facilities for "public use". *In the Matter of So. Cal. Edison Co.*, California Public Utilities Commission, 4 CPUC 2d 195, 1980 Cal. PUC Lexis 1053, Decision No. 92115, Case No. 59268, August 19, 1980, p. 22.

[18] The California Attorney General has determined that not all types of wire communication, even if owned by a statutory telephone corporation, constitute a telephone line within the meaning of Cal. Pub. Utility Code Section 7901. Rather, one must look at the end use of the facility to determine whether or not it constitutes a "telephone line" and the use of that line to provide video services as opposed to telephone services render the line not protected pursuant to Cal. Pub. Utility Code Section 7901 notwithstanding its ownership by a statutory Telephone Corporation. (46 *Cal.Ops.Atty. Gen.* 22, 23-24 (1965)).

Circuit struck down the Commission's preemption of local franchising of open video system ("OVS") operators as being in excess of its jurisdiction. In *Dallas*, the Commission attempted to preempt all local and state franchising of OVS operators pursuant to Section 653(c)(1)(C) of the TCA which states that, with a few exceptions, Parts III and IV of Title VI shall not apply to OVS operators. (See 47 U.S.C. § 573(c)(1)(C).) The Commission reasoned that included in the Title VI provisions that do not apply to OVS operators is § 621(b)(1), which provides that, with some minor exceptions, "a cable operator may not provide cable services without a franchise." (47 U.S.C. § 571(b)(1)). Based upon the interplay of these statutory provisions, the Commission reasoned that "any state or local requirements . . . that seek to impose Title VI 'franchise-like' requirements on an open video system operator would directly conflict with Congress' express direction that open video system operators need not obtain local franchises as envisioned by Title VI" and thus preempted state and local franchising. According to the Commission, once an OVS operator has been certified by the Commission, that entity had an enforceable right to access the PROW without any further state and local consent. (*See Implementation of § 302 of the Telecommunications Act of 1996, 2nd Report and Order*, FCC 96-249 (Released June 3, 1996) ("Rule Making Order") p. 211, on Reconsideration, 3rd Report and Order, FCC 96-334 (Released August 8, 1996) ("*Reconsideration Order*") p. 193.)

The *Dallas* court applied *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 476 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("*Chevron*") as the appropriate review standard. (*Id.* at 346.) Notwithstanding the deferential standard of *Chevron*, the Fifth Circuit held that Section 653(c)(1)(C) simply eliminated the federal requirement that a local franchise be obtained but did not preempt or extinguish the inherently local authority of state and local governments to require certain forms of authorizations for access to PROW. As the Court states:

> "Section 621 states that a cable operator may not provide cable service without a franchise. This amounts to a federal requirement that a cable operator obtain a franchise from a local authority before providing service. Eliminating Section 621 results in the deletion of the federal requirement that cable operators get a franchise before providing service; it does not eviscerate the ability of local authorities to impose franchise requirements,

but only their obligation to do so. Consequently, simply stating that Section 621 shall not apply to OVS operators does not expressly preempt local franchising authority, as Section 601(c)(1) requires." (Original emphasis.)

(*Id.* at 347.) Once again, the Fifth Circuit relied upon the fact that PROW franchising constitutes "a power traditionally exercised by a state or local government" in holding that any preemption authority of the Commission in relation to these types of activities must be grounded in ". . . unmistakably clear . . . language of the statute." The actual words of the court are instructive:

> "The FCC's broad reading of preemption authority also conflicts with Supreme Court precedent. In *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), the court held that if Congress intends to preempt a power traditionally exercised by a state or local government, 'it must make its intention to do so "unmistakably clear in the language of the statute."'"

(*Id.* at 460, 111 S.Ct. 2395 (quoting *Will v. Michigan Department of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)).

In *Dallas*, the Court found that Congress did not provide the clear statement that *Gregory* required. Because Section 601(c)(1) and *Gregory* prohibit implied preemption, and because Section 653(c)(1)(C) expressly preempts only the federal requirement of a local franchise, not the locality's freedom to impose franchise requirements as they see fit, the Commission erred in ruling that Section 653 prohibited local authorities from requiring local OVS operators to obtain a franchise to access the locally maintained rights-of-way:

> ". . . there are persuasive dicta supporting the contrary view that Section 621 merely codified and restricted local governments independently-existing authority to impose franchise requirements. Moreover, the legislative history of the 1984 Cable Act contradicts the Commission's claim that the Act contradicts the Commission's claim that the Act established Section 621 as the sole source of franchising authority. According to the House Report on H.R. 4103, whose terms were later incorporated into S. 66 to become the 1984 Cable Act.
>
> Primarily, cable television has been regulated at the local government level through the franchise process . . . . H.R. 4103 establishes a national policy that clarifies the current system of local, state, and federal regulation of cable television. This policy continues the lines on the local franchising process as a primary means of cable television regulation, while defining and limiting the authority of the franchising authority may exercise through the franchise process."

(*Id.* at 347-48.)

Federal law may not intrude into areas of traditional state and local sovereignty unless the clear language of the federal law compels the conclusion. (*Gregory v. Ashcroft*, 501 U.S. at 460, 111 S.Ct. 2395; *Commonwealth of Virginia v. EPA*, 105 F.3d 1397, 1410, (D.C. Cir. 1997), partial rehearing granted, 116 F.3d 499 (D.C. Cir. 1997); *City of Abilene, Texas, v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999).) The power to franchise PROW is traditional and historically local. Said power should include the right to receive reasonable compensation for the use of the PROW by way of franchise fees or otherwise. (*See City of Dallas, Texas v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997).)

The Commission possesses a far lesser degree of legal justification to preempt local franchising for the use of PROW for the provision of cable modem service than existed in *Dallas*. At least in *Dallas*, the Commission possessed colorable authority pursuant to Section 653(c)(1)(C).[19] In this case, the Commission appears to be relying on nothing more than its generalized authority to "promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority if the regulations are reasonably ancillary to existing Commission statutory authority." (DR/NPR., ¶ 75.) The Commission identifies Sections 1 and 4(i) of the Communications Act as the "existing Commission statutory authority" from which expansive ancillary jurisdiction allegedly flows. However, it is reasonable to conclude that the statutory authority cited by the Commission in *Dallas* to preempt local franchising of OVS operators use of PROW was far more compelling than the extremely generalized language contained in Section 1 and 4(i) of the Communications Act. However, the Fifth Circuit in *Dallas* did not find even more arguably concrete authority contained within the Communications Act sufficient to justify the elimination of the historic power of local government to regulate access to their PROW through their legislative franchising processes.

[19] It is interesting to note that the Commission did not attempt to rely upon its general "ancillary jurisdiction" pursuant to either Title II or Title VI of the Communications Act to justify its wholesale disablement of local franchising of OVS operators.

E. Title VI Specifically Contemplates The Collection of Additional Fees Beyond Cable Franchise Fees From Cable Operators Utilizing PROW To Provide Services Other than Cable Services.

Title VI recognizes that not all fees are cable television franchise fees. A fee is not a franchise fee unless it is imposed upon the cable operator or cable subscriber "solely because of their status as such." (§ 622(g)(1).) Taxes, fees, or assessments of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators on their services . . . which is not unduly discriminatory against cable operators or cable subscribers "if specifically excluded" from the definition of "franchise fee". (§ 622(g)(2)(A).) Title VI should not be ". . . construed to limit any authority of a franchising authority to impose a tax, fee, or other assessment of any kind on any person (other than a cable system for which charges are assessed to subscribers but not received by the cable operator). (§ 622(h)(1).) The Commission is specifically barred from regulating ". . . the amount of the franchise fees paid by cable operator, or regulate the use of funds derived from such fees, except as provided in [§ 622]." (§ 622(h)(1)(i).)

It seems obvious that Congress both contemplated and intended the potential imposition of fees upon cable operators in excess of the cable television franchise fees so long as said fee is not imposed upon the cable operator or the cable subscriber simply because of the status as the cable operator or cable subscriber. For example, without limitation, charges which are imposed upon utilities, such as telecommunications utilities, can be applied to cable operators providing equivalent services since they would not be imposed based upon "status". Not only is federal preemption to be narrowly construed pursuant to Section 622(h)(1)(i), but the Commission is specifically barred from expanding its authority beyond those limitations upon local authority specifically set forth in Section 622. (§ 622(h)(1)(i).)

F. Commission Preemption Of Local Franchising Is Ill Advised.

The construction of cable facilities capable of providing cable modem service constitute a significant and irreparable impact upon PROW. Local government is in the

best position to assess that impact and mitigate it by way of construction requirements, security requirements, access requirements, and PROW compensation requirements. Nothing in the DR/NPR demonstrates, or even credibly argues for, a contrary conclusion.

Cable television facilities capable of providing cable modem service and other non-cable services impose a materially greater impact upon PROW than do cable facilities which are designed simply to deliver video programming to subscribers. The experience of the California Franchising Authorities which have undergone rebuilds demonstrates this truism. First, the cable plant which is capable of providing cable modem service and other non-cable services tends to be different in design and construction than does cable plant not capable of providing this service. In fact, it is the experience of the California Franchising Authorities that many of the voluntary rebuilds which have occurred over the last five years were motivated, at least in part, by the desire to offer Internet and other "enhanced services". Most of the mandatory rebuilds required HFC architecture. As a result, PROW was significantly impacted through the replacement and, in some cases, removal of existing "trunk-branch" cable plant with much more facility intensive HFC architecture. As a result of its new cable design, not only was significant coaxial plant replaced with fiber but a significant amount of "street furniture," such as pedestals, nodal boxes, power supplies, and other facilities essential to the provision of cable modem service, which would not exist in most cases but for the provision of cable modem service, appeared in PROW. HFC architecture, with its accompanying fiber robust construction practices and necessary "street furniture," was clearly motivated by the cable operator's desire to access the Internet. Although cable subscribers enjoyed the benefits of such construction by way of the deployment of advanced services, the PROW, which in most cases is the single most valuable asset held by local government, suffered material and negative consequences.

The rebuild of cable systems to HFC architecture itself constitutes a disruptive activity to a community. Streets are cut, lanes are blocked, traffic is diverted, quiet is disturbed, and nerves are often frayed as a result of a community-wide HFC rebuild. In

many cases, as has been proven through numerous studies, trenching associated with cable construction, as well as any other form of underground utility construction, materially degrades the quality of the PROW resulting in reduced life span and accelerated capital replacement costs. Residents who had never seen an above-ground equipment installation are now faced with the sudden gestation of numerous pedestals and boxes housing the active electronics associated with a HFC rebuild. Because Internet capable cable plant requires a more robust fiber deployment and higher reliability than good old fashion analog and even digital video plant, streets are now littered with numerous type pedestals, boxes, and encasements, ranging from bread-box size pedestals to refrigerator size nodal boxes and power supply enclosures, based upon the desire of the cable operator to deploy advance high speed services. To argue that HFC cable plant does not impose a significant burden upon PROW and other public property is the paramount of naiveté.

Local government is in the best position to control this type of disruption and seek a balance, by way of fair market value rental payments, between the goal of deploying advanced services and the PROW and public property devoted to this proprietary use. By way of the franchise fee, local government is allowed to charge reasonable compensation for the use of PROW for the provision of cable services up to a maximum of 5% of revenues generated from said cable services essentially as market rent. (*Group W Cable, Inc. v. City of Santa Cruz*, 679 F.Supp. 977 (N.D. Ca., 1988)). Likewise, telecommunication service providers must provide fair and reasonable compensation to local government for the use of its PROW in an amount which approximates fair market value which amount is not limited to the costs imposed upon the PROW based upon the provision of said telecommunication services. (*Qwest Corporation v. City of Portland, et al.*, Civil No. 01-1005-JE (DC-Oregon, March 22, 2002); see also *TCG Detroit v. City of Deerborne*, 206 F.3d 618, 624-25; *AT&T Communications of the Pac. Northwest v. City of Eugene*, 177 Or. App. 379, 410, 35 P.3d 1029, 1046 (2001); *Bell South Telecommunications, Inc. v. City of Orangeburg*, 522 S.E.2d 804, 808 (1999).) There is no logical reason to treat cable modem services differently from cable services and telecommunication services in terms

of being required to pay their fair share of compensation for use of the PROW.

Preempting local control of cable modem service would also significantly dilute the rights of local subscribers to the customer service protection which has been afforded to them by local government pursuant to Title VI. Title VI sustains the consumer protection authority of local governments. Local government currently assumes responsibility for addressing or resolving consumer complaints involving both video and non-video services offered over the same cable platform. Consumers do not stop to question whether cable modem service might be an interstate information service, telecommunications, a common carrier telecommunication service, or a cable service before calling its municipality to complain about poor service being provided by the same cable operator that provides and bills, often in a single billing format, for analog video service, digital video services, and internet services. Local government retains significant legal authority to impose appropriate customer service requirements on cable operators. (47 U.S.C. § 552). Statutory authority allows local government to establish and contour appropriate customer complaint resolution mechanisms appropriate to the size and other unique characteristics and problems of each community.

The experience of the California Franchising Authorities in relation to the deployment and provision of cable modem service is inconsistent but becoming more problematic. Many of its members are receiving an increasing number of customer complaints relating to the provision of cable modem service in such areas as interruptability, speed, billing, telephone response, and other areas which are consistent with the type of customer service problems plaguing cable operators in relation to the provision of video services.[20]

[20] It is not surprising that the incidents of consumer complaints skyrocketed during the transition from Excite@Home to proprietary ISP services provided by many of the affected cable operators. Although one can ascribe these problems to a unique circumstance (i.e., the bankruptcy of Excite@Home), the need for customer protection from such an event is not offset by the supposed nonfrequency of ISP bankruptcies. These consumers would have had no remedy whatsoever had they not been able to petition local government pursuant to the consumer protection provisions of Title VI. Deregulation by way of federal preemption would have left disenfranchised consumers without any expedient remedy.

From a practical viewpoint, the provision of customer service protection by local government constitutes the most efficient and cost effective means of providing any form of customer protection. Based upon the Excite @Home bankruptcy, many cable operators have established their own proprietary networks. These networks are operated in conjunction with the rest of the cable system and are often staffed, from a customer service viewpoint, with CSRs and other professionals who likewise provide traditional video services. It seems nonsensical to impose customer service standards upon these entities and individuals when they provide some form of video service but allow them to take as long as they want to answer their phones or fix service disruptions if the service is cable modem as opposed to video even though we are often dealing with the same people and the same physical plant.[21]

The availability of competitive delivered advance services, primarily through DSL technology, is not sufficiently robust to assure high quality services at competitive prices without some form of governmental regulation. In several of the California Franchising Authorities, no DSL service is available. In other communities, DSL availability is spotty and inconsistent with wait-times, even when otherwise available, running from weeks to months. It is premature to conclude, based upon the evidence made available by the Commission in its *Third Report*, that competitive services are sufficiently available to eliminate, at this point in time, the need for some form of consumer protection regulation at the local level.[22]

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[21] "Bundling," which constitutes the sale of cable services with other services including Internet services, makes the arguments for local compensation and customer service requirements even more compelling. By combining traditional video services with Internet services through bundled discounts, cable operators possess the flexibility to minimize even the Title VI franchise fees available to local government through disproportion allocations of discounts to the video as opposed to Internet side of the ledger. In addition, to the extent that cable modem subscribers possess no customer service remedy at the state or local level, such a subscriber is forced to choose between paying more for potentially regulated DSL services, assuming they are likewise not deregulated by this Commission, or accepting the bundled discount in exchange for a product which has no warranty of fitness enforceable at any level. Such a "Hobson's" choice seems inconsistent with subscriber protection.

[22] Competition for competition sake is not sufficient to justify public policy unless said competition is shown to have a benefit to the public. "Merely to assume the competition is bound to be of advantage, in an industry so regulated and so largely closed as this one, is

VII. THE COMMISSION SHOULD NOT AND CANNOT FOREBEAR ENFORCEMENT OF TELECOMMUNICATIONS SERVICE REGULATIONS AGAINST CABLE MODEM SERVICE AND CABLE SERVICE MODEM FACILITIES IN THE NINTH CIRCUIT.

The Commission acknowledges that the Ninth Circuit has held, perhaps in dicta and perhaps not, that cable modem service, at least in part, constituted a telecommunications service within the meaning of the TCA. The court in *AT&T v. City of Portland* concluded:

> "@Home consists of two elements: . . . to the extent @Home is a conventional ISP, its activities are that of an information service. However to the extent that @Home provides a subscriber internet transmission over its cable broadband facility, it is providing a Telecommunications Service as defined in the Communications Act."

(*AT&T v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000) reversing 43 F.Supp.2d 1146 (D. Ore. 1999).)

The Commission appears to chide the Ninth Circuit for adopting a regulatory classification based upon a record that that was "less than comprehensive." (DR/NPR, ¶ 57.) The Commission further notes that it has developed a far more comprehensive record relating to the appropriate regulatory classification than had the Ninth Circuit (DR/NPR, ¶ 57) and that the Ninth Circuit did not have the benefit of the briefings by the party or the Commission on this issue. (DR/NPR, ¶ 58.) While such may or may not be the case, these facts in no way obliterate or even mitigate the legal effect of the Ninth Circuit's ruling as to the appropriate classification of cable modem service in this circuit.

Recognizing its potential legal infirmity in overruling a decision of the Ninth

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not enough." (*Hawaiian Telephone Company v. FCC*, 498 F.2d 771, 775-76 (1974) quoting *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96-97, 73 F.Ct. 998, 1005, 97 L.Ed. 1470 (1953)). The Commission cannot "merely assert the benefits of competition in an abstract, sterile way." (*Hawaiian Telephone Company v. FCC*, *id.* at 776-77). The words of the Court are particularly illuminating in this regard:

> "The whole theory of licensing a regulation by government agencies is based on a belief that competition cannot be trusted to do the job of regulation in that particular industry which competition does in other sectors of the economy. Without in any way interrogating the merits of the competitive free enterprise system in the economy as a whole, we cannot accept the action of the FCC here in a tightly regulated industry, supported by an opinion which does no more than automatically equate the public benefit with additional competition." (*Id.* at 777).

Circuit, the Commission further states that it possesses the legal authority to "forebear from Title II regulation (to the extent other jurisdictions seek to apply it)" and, in fact, tentatively concluded that such Title II regulation would not be appropriate and that the Commission should forebear. (DR/NPR, fn. 219; ¶ 94.) With all due respect, the California Franchising Authorities strongly argue that the Commission does not possess the legal jurisdiction to forebear in such a way as to preclude local government from applying Title II regulations to cable modem service to the extent said regulation is otherwise appropriate pursuant to Title II. ("[Section 10] . . . is not intended to limit or preempt state enforcement of state statutes or regulations." *House Report*, p. 185, 4 U.S. Code Cong. & Admin. News 198.) In addition, even if the Commission does possess such legal jurisdiction, the robust development of cable modem service in the past and the need in the future to protect consumers from potential monopolistic or oligopolistic abuses in the delivery of this service precludes a finding in favor of regulatory forbearance.

The legal authority of the Commission to forebear from Title II regulation is limited by both case law and statute. Prior to the adoption of the TCA, Title II regulatory forbearance decisions of the Commission were voided by the courts on several occasions.[23] In *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995), the DC Circuit struck down the second of the Commissions attempts to relax the tariff filing requirements for non-dominant carriers. Notwithstanding the express direction of the Communications Act that "every common carrier . . . shall . . . file 'tariffs with the FCC.'" 47 U.S.C. § 203(a), the Commission attempted to exercise discretion to forebear. In a series of cases, the DC Circuit found, that for numerous reasons, the FCC had no authority or discretion to change Congress' clear demands. (*MCI v. FCC*, 765 F.2d 1186, 1191092 (D.C. Cir. 1985).) As the court stated in *Southwestern Bell Corp.:*

> "This case primarily turns on one fundamental notion: Congress enacted the Communications Act and the mandates of the Act are not open to change by the Commission or the courts. If the Commission believes those mandates inadequate to the task of regulating the telecommunications industry in light of changed circumstances, the Commission must take its case to Congress.."

[23] Prior to the adoption of the TCA, forbearance decisions of the Commission were often expressed either in terms of "forbearance" or as "waiver."

(*Supra*, 43 F.3d at 1519.)[24]

The statutory landscape changed, however, when Congress passed the TCA in 1996 which added Section 10(a) (47 U.S.C. § 160) which required the Commission to forebear from applying any regulation or any provisions of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that:

> (1) "Enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connections with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) Enforcement of such regulation or provisions is not necessary for the protection of the consumer; and
>
> (3) Forbearance from applying such provision or regulation is consistent with the public interest."

(47 U.S.C. § 160(a) (hereinafter, "Section 10")). Forbearance decisions are analyzed pursuant to the analytical model of *Motor Vehicle Manufactures Association v. State Farm Mutual Automobile Insurance Co.*, *supra*, 463 U.S. 29. Although significant deference is granted, the Commission's decision to change an existing regulatory regime must be made on the basis of "reasoned analysis." (*Id.* at 43.) The Commission cannot rely upon its forbearance authority pursuant to Section 10 to change established policies without a well-reasoned and articulated record in basis for said departure. As the court stated in *AT&T Corp. v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001):

> ". . . No matter how reasonable it may be for the FCC to require market share data before evaluating an incumbent local exchange carrier's market power, it is not reasonable for the Commission to announce such a policy without

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[24] In a prior case involving a similar discretionary de-tariffing program, the Second Circuit reached a similar conclusion:

> "In enacting §§ 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions. A balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation."

MCI v. FCC, 765 F.2d at 1195 (quoting *AT&T v. FCC*, 47 F.2d 865, 880 (2nd Cir. 1973).

> providing a satisfactory explanation for embarking on this course when it has not followed such a policy in the past. The FCC 'cannot silently depart from previous policies or ignore precedent' as it has done here . . . . No matter how reasonable the FCC's position that market share data is necessary for a prime facie showing of market competition, the FCC's conclusory statements cannot substitute for the reasoned explanation that is wanted in this decision." (Citations omitted.)

Section 10 may or may not, depending upon the administrative record, sanction the Commission to forebear from applying its own regulations pursuant to Title II to cable modem service. Such a proposition could only be tested upon the factual showing which supports or does not support the factual findings essential to a Section 10 forbearance decision. However, Section 10 does not provide any authority for the Commission to forebear from the imposition of Title II regulation by local government, to the extent otherwise authorized by federal, state and local law, since forbearance, as set forth in Section 10, constitutes a self-imposed limit upon the exercise of the Commission's authority as opposed to a broad authorization to preempt the authority of other levels of government. The statutory language is clear and unambiguous.

In addition, Section 10 must be read in conjunction with other provisions adopted at the same time. For example, Section 601(c)(1) provides: "this Act of amendments made by this Act shall not be construed to modify, impair or supersede federal, state or local law unless expressly so provided in such act or amendment." ("This provision prevents affected parties from asserting that the bill impliedly preempts other laws." House Conference Report, Id. at 201, 4 U.S. Code Cong. & Admin. New 215.) There is an accompanying savings provision regarding the "modification, impairment, or supercessation of, any state or local law pertaining to taxation." (*Id.* at § 602(c)(2).)

Section 253(c) provides a "safe harbor" affirming the longstanding authority of local government to manage its rights-of-way and require "fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, for the use of public rights-of-way on a non-discriminatory basis if the compensation required is publicly disclosed by such government." (47 U.S.C. § 253(c).) The Commission cannot simply waive its "forbearance wand" and deprive state

and local government of the rights granted to them by express provisions of the TCA including, without limitation, Section 253(c).

VIII. THE INTERNET TAX NONDISCRIMINATION ACT DOES NOT PROHIBIT LOCAL GOVERNMENT FROM COLLECTING FRANCHISE FEES OR OTHER FEES RELATING TO THE USE OF PROW FROM CABLE OPERATORS PROVIDING NON-CABLE SERVICES.

The Internet Tax Freedom Act, as amended and extended by the Internet Tax Freedom Act (collectively, the "Internet Act") limits the ability of state and local government to impose "taxes" upon the Internet or Internet users. The Internet Act defines a "tax" "to be . . . any charge imposed by any government entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred . . ." (§ 1104(a)(A)(i)). The term "tax" specifically excludes ". . . any franchise fee or similar fee imposed by a state or local franchising authority, pursuant to Section 622 or 653 of the Communications Act of 1934 (47 U.S.C. § 542, 573) or any other fee related to obligations of telecommunication carriers under the Communications Act of 1934." (47 U.S.C. § 151 *et seq.*). Thus, the Internet Act draws a classic distinction between general revenue raising exactions and those imposed for a specific privilege, service or benefit. It is the predominant view that franchise fees and other fees imposed upon users of PROW constitute "user fees" or "regulatory fees" and not "taxes" for federal purposes. (*Quest Communications Corp. v. City of Berkeley*, 146 F.Supp.2d 1081 (N.D. Ca. 2001); *AT&T Communications of Southwest, Inc. v. City of Austin*, 42 F.Supp.2d 708, 711 n.4(1998); *City of Dallas v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997).) The Commission should not be led down the garden path of local preemption based upon a notion that the Internet Act already prohibits franchise-fee-like impositions upon cable operators providing cable modem service. In reality, the Internet Act clearly contemplates said impositions to the extent allowed by applicable state law.

IX. THE COMMISSION SHOULD NOT ASSERT JURISDICTION OVER THE TREATMENT OF FRANCHISE FEES PAID UPON CABLE MODEM SERVICE PRIOR TO THE EFFECTIVE DATE OF THE DR/NPR.

Franchise fees on cable modem services collected from cable operators prior to the effective date of the DR/NPR were imposed and collected in good faith and based upon the wide spread belief that cable modem service constitute a "cable service" subject to Section 622 franchise fees. No public purpose is served by attempting to upset that determination on a retroactive basis.[25] The Commission's determination that cable modem service constitutes an "interstate information service" possesses no retroactive component. Its classification decision ran contrary to not only the basic assumptions of the cable industry and local government but flies in the face of prior Commission actions in which the Commission has implicitly determined (see discussion of Commission Social Contracts, fn. 9) that cable modem service either constituted a cable service or at least possesses a cable service component.[26]

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[25] The Commission has itself acknowledged that "the answer to this questions [is cable modem a 'cable service'] is far from clear. (Brief for FCC as *Amicus Curia, in AT&T Corp. v. Portland,* No. 99-35609, p. 19.)

[26] The Commission's determination that local government cannot collect a franchise fee on cable modem service revenues pursuant to Section 622 is based upon the Commission's implied determination that the 1996 amendments to Section 622 were intended by Congress to apply retroactively to preempt existing franchise provisions inconsistent therewith. (DR/NPR, ¶ 105, pp. 53-54.) In fact, many franchising authorities, including numerous members of the California Franchising Authorities, possess franchise agreement provisions which broadly define "gross revenues" to include all revenues generated from use of the cable system irrespective of the classification of the service provided. Retroactive application of the 1996 amendment to Section 622 is disfavored (*Stevens v. Employer - Teamsters Joint Council No. 84 Pension Fund,* 979 F.2d 444 (6th Cir., 1992); *Jeffries v. Wood*, 114 F.3d. 1484 (9th Cir. 1997) *cert. denied* 118 S.Ct. 586, 139 L.Ed. 2d 423 (1997); *James Cable Partners, L.P. v. City of Jamestown, Tenn. by. Duncan*, 43 F.3d 277 (6th Cir. 1995). The legislative history certainly demonstrates no intent on the part of Congress to invalidate or preempt existing franchise agreement provisions which were bargained for between local government and cable operators in good faith. In fact, the legislative history contemplates little if any negative budgetary impact upon local government, thus evidencing no retroactive preemption intent. (*House Report*, Id., 4 U.S. Code Cong. & Admin. News 35-36.) In many cases, the California Franchising Authorities bargained for extremely broad definitions of "gross revenue" so as to include all services offered upon the cable system as opposed to those services which are ultimately now determined to be "cable services". Given the fact that Congress did not expressly preempt these arrangements upon a retroactive basis. The Commission should not do what Congress expressly chose not to do.

Dated: June 13, 2002

Respectfully submitted

RUTAN & TUCKER, LLP
WILLIAM M. MARTICORENA

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ATTORNEYS FOR THE CALIFORNIA FRANCHISING AUTHORITIES

CERTIFICATE OF SERVICE

I, Valerie Bloom hereby certify that I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

On June 13, 2002, I caused the within *INITIAL COMMENTS OF THE PUBLIC CABLE TELEVISION AUTHORITY, CITIES OF BERKELEY, ESCONDIDO, GLENDALE, HAWTHORNE, INDIAN WELLS, IRVINE, LAGUNA BEACH, LA QUINTA, MORENO VALLEY, SAN CLEMENTE, SAN DIEGO, SAN JUAN CAPISTRANO, AND SANTA CRUZ, CALIFORNIA AND THE COUNTY OF SANTA CRUZ CALIFORNIA*; GN Docket No. 00-185, CS Docket No. 02-52, to be filed with the Office of the Secretary of the Federal Communications Commission via Federal Express as more particularly described on the attached Service List.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Valerie Bloom

Valerie Bloom

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